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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Teamsters, Chauffeurs & Helpers Local Union No. 79, (herein "Petitioner") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on December 5, 1963.

OPINIONS BELOW

The National Labor Relations Board Decision and Order issued March 6, 1961, is reported at 130 NLRB 1208, and is printed in Appendix A at pp. 1a to 8a.

The Decision and Order of the National Labor Relations Board issued on July 20, 1962, after remand from the Court of Appeals, is reported at 137 NLRB 1545, and is printed in Appendix A at pp. 27a to 32a.

The Opinion of the United States Court of Appeals for the District of Columbia Circuit rendered December 5, 1963, denying our petition to review the orders of NLRB, is not yet officially reported. It is reproduced at 48 CCH Labor Cases ¶18,626; 54 LRRM 2707; and is printed in Appendix A at pp. 33a to 36a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered December 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Section 10(e) of the Labor Management Relations Act of 1947 as amended, 29 U.S.C. §160(e).

QUESTIONS PRESENTED

Does discharge of truck drivers for refusal to cross a primary picket line established at the premises of a shipper constitute violation of Sections 7 and 8(a)(1) of the Labor Management Relations Act?

Is such refusal to cross such picket line [found by a majority of NLRB to be a "protected" activity under §§7 and 8(a)(1) of the statute, 29 U.S.C. 157, 158(a)(1)] a right to which the statute grants protection, despite its adverse affect on carriers' business?

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947, as amended (61 *Stat.* 136, 29 *U.S.C.* 151, *et seq.*; particularly §§7, 8(a)(1); 8(b)(1); 8(b)(4)(B); 13; and 502, are printed in Appendix B, *infra*, p. 1b.

STATEMENT

Eight truck drivers employed by a common carrier, Redwing,[1] were discharged for refusal to cross a primary picket line at the entrance to the plants and mines of Virginia-Carolina Chemical Co. (herein "V-C").

The V-C employees, members of International Chemical Workers Local Union, called a strike and established primary picket lines at V-C. For ten

[1] "Redwing" is used throughout this petition to refer collectively to Redwing Carriers, Inc. and Rockana Carriers, Inc., the employers who were respondents before the NLRB.

days V-C made little effort to operate, and Redwing's hauling operations to and from V-C were reduced to occasional trips. Even these were harried by the V-C strikers, pickets and their sympathizers shouting epithets, taking motion pictures, physically blocking the roadways, threatening bodily harm, kicking one driver and threatening others.[2] It is stipulated that thereafter misconduct occurred at and in the vicinity of the V-C picket line which created hazardous conditions of employment for persons required to cross the V-C picket line.

On June 1, V-C requested the Company to resume

[2]The *Board's* brief in the Court of Appeals states the Board's findings as follows:

"On May 27 Rockana driver Donald Shirley was stopped at an entrance to V-C's property by pickets who took moving pictures, shouted 'scab' and 'picket line breaker,' and asked him not to cross the picket line 'until something was straightened out' (J.A. 17; 71, 73). Shirley turned back and promptly called the Company for instructions. He was told to wait, that someone would come to give him safe passage through the line. Later he was escorted into V-C by a deputy sheriff (J.A. 10, 17; 71-72).

"On May 29, Rockana driver Andre Francoeur approached the picket line at one of V-C's facilities to make a pickup. As he did so, between 25 and 30 pickets 'strung themselves across the road' blocking his passage (J.A. 17; 59-60). When Francoeur stopped, the apparent leader of the pickets 'jumped on the running board' of the truck and told Francoeur that 'it would be more healthy' if he turned 'around and did not make the pickup' (J.A. 17; 60). Francoeur turned around and went to a nearby grocery store, followed by about a dozen pickets (J.A. 10, 17; 60-61, 62). There he telephoned the Company and reported what had happened. He was told to stay where he was and that someone would be sent to help him (J.A. 17; 61). After this call, the pickets milled around Francoeur threatening to assault him and crowding him out of the store (J.A. 17-18; 61-62). As Francoeur started to leave, he was kicked by one of the pickets (J.A. 10, 18; 62-63). When he drove off the pickets followed his truck for about two miles. Upon returning to the terminal, Francoeur reported to the Company and to the other employees what had happened (J.A. 18; 62-63, 66).

"Also on May 29, while Rockana drivers John Sewell and Aubrey Cribbs were eating supper in a diner near V-C's premises, they were approached by 8 or 10 men and told 'I hope you boys are not planning on going in [to V-C] because we are on strike and if you do we ain't going to promise you what will happen' (J.A. 10, 18; 106). Sewell replied, 'If that is the way it is I am not going in there.' As Sewell and Cribbs left the diner, the men stated 'you boys be sure and watch your steps' (J.A. 18; 106)."

The letters "J.A." refer to the Joint Appendix filed in the Court of Appeals The letters "S.A." refers to the Supplemental Appendix there filed.

normal hauling operations. The next morning, the Company gave V-C assignments to some of its drivers. After discussing the assignments among themselves and with other drivers, the drivers assigned to V-C informed the Company that they were available for other work, but that they would not cross the V-C picket line because they anticipated personal injury and damage to the Company's equipment. The company advised them that they must accept their V-C assignments or be discharged. Six drivers refused to accept the assignments. The Company discharged them and transferred the assignments to other drivers. Another employee was similarly discharged that afternoon.

The Board's trial examiner held that "Section 7 of the Act recognizes a right of employees to work together for their mutual aid or protection . . . the activity here involved was concerted activity protected by the Act . . ." (J.A. 24-25). The NLRB examiner further concluded that the drivers were motivated by the good faith belief that abnormally dangerous conditions existed, further justifying the determination not to cross the picket line,[3] J.A. 23-24.

Accordingly, the examiner concluded that the drivers' refusal to cross the picket line at the customer's premises "was protected concerted activity and that their terminations were therefore unlawful", J.A. 26. The examiner recommended that the

[3]Though the examiner found the drivers in good faith believed abnormally dangerous conditions existed (J.A. 24); he further found that the conditions surrounding the picketing "were sporadic and uncertain and it was speculative whether employees would be subjecting themselves to harm by going into the area." (J.A. 24).

carrier-employer be required to cease and desist from interfering with employees in the exercise of Section 7 rights, and to reinstate and make whole the drivers for any loss of pay suffered, J.A. 28.

The Board, by a three member panel, reversed, and dismissed the complaint, J.A. 6-13. The Board's Decision, while adopting the findings of the Examiner,* held that neither the facts there found nor the record established that abnormally dangerous conditions existed in connection with the crossing of the picket line (J.A. 12).

The Board further held that an employee's refusal in the course of his assigned duties to cross a picket line at the plant of another employer, while continuing on the job for the performance of his other work is unprotected activity, for which he could properly be discharged.

On remand, the Board by a three to two majority found that the employees had engaged in a *protected* concerted activity when they refused to cross the picket line, but held that Redwing in furtherance of its "right to attempt to run [its] business" could discharge complainants because of their refusal to cross the V-C picket line.

Thus the Board holds that the "protected concerted activity" of refusal to cross a picket line, is not to be protected, but must give way to employer's "right to attempt to run [its] business."

The Court of Appeals after summarizing the

*Except to the extent they are inconsistent with the Board's Decision (J.A. 7).

above facts[5] cited *NLRB v. Rockaway News Supply Co.*, 197 F. 2d 111 (C.A. 2, 1952), aff'd. on other grounds, 345 U.S. 71 (1953), as support for the Board's Order, and denied our petition to review.

REASONS FOR GRANTING THE WRIT

1.

By the decisions below the refusal to cross a picket line is "*protected* concerted activity" which the Board will not protect against employer's assertion that he must (in the interest of running his business) discharge those who engage in "protected" concerted activity. Such holding is neither good law nor good labor relations.

Either an activity is "protected" under the statute, in which event the Board has the duty of protecting it; or it is "unprotected." The present decision, by which the Board holds the activity "protected," but refused to "protect" it, makes for chaos and confusion for both employer and employee presented with questions as to whether to cross a picket line.

Since 1936 the Board and the courts have been met with questions as to whether an employer may lawfully discharge an employee who respects a picket line. In that year the Board held that dis-

[5]The *facts* as found by the Board are not disputed. We do dispute certain conclusions which the Board draws from the facts which it found. We note that the Court of Appeals misapprehended the facts as found by the Board; viz: The Court of Appeals at p. 2 of its slip opinion finds that complainants' "... services were terminated by the employers *and new employees were hired.*" Emphasis added. But the Board's own statement of the case [Board's Brief to Court of Appeals, p. 5] asserts: ". . . Six drivers refused to accept the assignments (J.A. 9-10; 19; 46; 127-132). The company discharged them *and transferred the assignments to other drivers* (J.A. 19; 101-102, 124)." Emphasis added.

charge for respecting a picket line was unlawful. *In re Club Troika, Inc.*, 2 NLRB 90, 94 (1936). There followed a long line of cases under the Wagner Act holding it unlawful to discharge because of respect for a picket line.[6]

In *Rockaway News Supply Co., Inc.*, 95 NLRB 336 (1951), the Board held it an unfair labor practice for employer to discharge an employee who refused to cross a picket line. The Second Circuit, by 2 to 1, refused to enforce, 197 F. 2d 111 (C.A. 2, 1952). Certiorari was granted on the assertion that the questions as to the respective rights of employer and employee regarding honoring picket lines were of extreme importance in the administration of the Act. The Board, the affected employer, and numerous *amici* (including the A. F. of L. and the CIO) filed briefs pointed principally to the important question of whether an employer could lawfully discharge an employee for refusal to cross a lawful picket line of another union at the plant of a union other than his own.

This Court divided (6-3); the majority opinion, by Mr. Justice Jackson refusing to make a "determination of rights or duties respecting picket lines broader than this [collective bargaining] contract itself prescribes," 345 U.S. 71 at 79. The majority in *Rockaway* held the "no strike" provision of the collective bargaining agreement to be applicable and controlling; and did not reach the basic question of the legality of discharge for refusal to cross the picket line. Mr. Justice Black's dissent on broader

[6] See Annotation, *"Discharge of employee who refused to cross picket line as unfair labor practice,"* 31 ALR 2d 519 (1953), and cases there cited.

grounds ". . . agree[d] with the Labor Board that it was an unfair labor practice for the employer to discharge a union employee who refused to cross a picket line." 345 U.S. at 81.

The instant case presents the first opportunity since *Rockaway* for a determination of the issue.

Meanwhile the NLRB has taken various positions. In the *Auto Parts* case, 107 NLRB 242 (1953) it held that the refusal to cross the picket line was not a protected concerted activity. Similarly in its original decision in the case at bar, the refusal to cross was held "not protected." On remand (by 3-2) the Board held the refusal "protected," but refused to protect it.

Meanwhile, the Board was holding in a long line of cases that the concomitant right *not* to engage in protected concerted activity was violated by a union which coerces employees who wish to refrain from respecting a picket line; i.e. the Board holds that union interference with employees who go through the picket line denies to such employees rights guaranteed in Section 7.[7]

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[7]See e.g., *District 50, United Workers of America (Tungsten Mining Corp.)*, 106 NLRB 903, 907-908 (1953); *United Electrical, Radio & Machine Workers (American Rubber Products Corporation)*, 106 NLRB 1372, 1377-1378 (1953); *Warehouse & Distribution Workers Union (Coca-Cola Bottling Co. of St. Louis)*, 115 NLRB 1506, 1507, 1510-1511 (1956); *Highway Truck Drivers and Helpers, Local 107 (Virginia-Carolina Freight Lines, Inc.)*, 123 NLRB 551, 552, 558 (1959), enf'd. 273 F. 2d 815 (D.C. Cir. 1959).

These cases, on their facts, involved acts of coercion by a picketing union directed at employees of the struck employer. But this fact is immaterial. The Board has been equally consistent in holding, subsequent to *Auto Parts Co.*, 107 NLRB 242 (1953), that a striking union which coerces truck-driver employees of other employers who wish to cross the picket line thereby denies to such truck-driver employees their protected right to refrain from respecting the picket line. *International Woodworkers of America (W. T. Smith Lumber Company)*, 116 NLRB 507, 509, 519-520, 525-526 (1956), enf'd 243 F. 2d 745 (5th Cir. 1957); *Local No. 3887, United Steel Workers of America, AFL-CIO (Stephenson Brick & Tile Company)*, 129 NLRB 6, 7-9 (1960), enf'd 290 F. 2d 587 (5th Cir. 1961); *Highway Truck Drivers and Helpers Local 107 (Riss & Company, Inc.)*, 130 NLRB No. 91, 47 LRRM 1403, 1404-1405 (1961).

Finally, in two cases[8] decided since the second decision in the instant case, the Board held discharges for refusal to cross a picket line in a context of anti-unionism to be unlawful.[9]

In these circumstances, more than twenty-five years after the passage of the original Act neither employer, employee, or union can act with confidence in the oft-recurring picket line situation. The simple question which the truck driver often meets: "Must I go through that picket line to hold my job"

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[8] *In re Everist*, 142 NLRB No. 20, 1963; *Cone Bros. Contracting Co.*, 317 F. 2d 3 (C.A. 5, 1963).

[9] The explication of the *Redwing* holding which the Board included in its recent *Everist Decision, 142 NLRB No. 20* (April, 1963) cannot be squared with the language of the *Redwing* Opinion or the Redwing record. In *Everist* the Board said; D-5325, Slip Opinion, p. 4:

> "• • • in Redwing, the Board found that an employee's refusal to cross a picket line was protected activity. Redwing holds, in effect, that a 'discharge' for refusal to cross a picket line is an exception to the general rule that employees may not be discharged for engaging in protected concerted activity. It is therefore not a discharge for cause, but merely a permissible act in furtherance of the employer's overriding right to keep his business going by replacing such employees. To this extent, at least, the employees involved herein are similar to economic strikers, who may also be replaced by an employer to permit continued operation of the business but who, if not permanently replaced, are entitled to reinstatement upon unconditional application. It follows, therefore, that where, as here, no permanent replacement has occurred at the time the claimants unconditionally apply for reinstatement so that their jobs are still available, the employer is obligated to return them to work. In light of its continued need for employees, the Respondent's argument that it was seeking to replace the claimants in order to operate its business falls and its refusal to reinstate them because of their refusal to cross a picket line necessarily constitutes a penalty for engaging in that protected activity. Accordingly, we find that by its conduct the Respondent violated Section 8(a)(1) of the Act."

Had this rationale actually been followed in *Redwing*, complainants could not have been permanently terminated for (1) Pierola testified they were not replaced by "new" employees; rather others were transferred to their assignments. (2) the *Redwing* supplemental opinion specifically eschews the very distinction between "replacement" and "discharge," Supp. App., p. 11, which it applies in *Everist*.

must be answered: the law protects you in your decision not to cross the picket line—for you engage in a "protected" concerted activity; but the NLRB will permit your employer to fire you for engaging in the "protected" activity."[10]

2.

The decisions below ignore and are contrary to the rationale of this Court's Opinion in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). There this Court held: "protected" concerted activities within the guarantee of Section 7 and 8(a)(1) may not lawfully be the basis for employer discipline unless they are unlawful, violent, in breach of contract or "indefensible" because unrelated to legitimate worker concern and indicative of a disloyalty to the workers' employer. 370 U.S. 9 at 17.

The concerted activities here at issue, refusal to cross a picket line, do not fall within any of these exceptions. To the contrary, the refusal to cross a picket line is a traditional and valid means by which workmen seek to give and to gain mutual support. Cf. Annotation, "Discharge of employee who refused

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[10] *Cone* and *Everist*, *supra*, note 8, point to NLRB protection of the "protected" activity, but apparently only when the discharges are in a context of anti-union animus. Of course the problem usually arises in a context in which that factor is unascertainable; i.e. a driver is told to make a delivery to a particular point. He arrives there and sees a picket line. What are his rights and duties? Until this Court speaks on that question, exercise of the driver's "protected" right not to cross will get him fired.

to cross picket line as unfair labor practice," 31 ALR 2d 519 (1953)."

Moreover, this record shows the necessity of "mutual protection" which the complainants sought in their concerted refusals to cross the V-C picket line, for the drivers were cursed and abused, threatened with assault, kicked, followed, and as the Board found on the very day that these drivers refused to cross the picket line a convoy of other Redwing trucks sent to the V-C premises was met with "attempted blocking and cutting off the road of Redwing's trucks, cursing, threatening, throwing objects at drivers, strewing nails on the road, and the firing of a shot by an unidentified source." Moreover, it is stipulated that on and after the date of the refusal to cross the picket line, "there was sub-

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[11]Cf. Judge Learned Hand's Opinion in *NLRB v. Peter C. K. Swiss Chocolate Co.*, 130 F .2d 503, 505-506:

"When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established in 'mutual' aid in the most literal sense, as nobody doubts. So too of those engaging in a 'sympathetic strike,' or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in 'mutual aid or protection.' Cf. *Fort Wayne Corrugated Paper Co. v. National Labor Relations Board*, 7 Cir., 111 F. 2d 869, 873, 874. It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained (e.g., *Duplex Printing Co. v. Deering*, 254 U.S. 443, 471, 472, 474• • •), but it seems to us that the [Wagner] act has put an end to this."

stantial damage to [Redwing] equipment by nails and thrown objects . . . . [their] drivers were threatened, assaulted and shot." It is further stipulated that after June 2 there was misconduct at and in the vicinity of the picket lines and violence which created hazardous conditions of employment for persons required to cross these picket lines.

In these circumstances, refusals to cross the picket line were not merely abstract "protected" concerted activities. They were, paraphrasing this Court's opinion in *NLRB v. Washington Aluminum*, "concerted activities by employees for the purpose of trying to protect themselves" from dangerous working conditions. As such, they were "unquestionably activities to correct conditions which modern labor management legislation treats as too bad to have to be tolerated . . ." *NLRB v. Washington Aluminum*, 370 U.S. 9 at 17 (1962).

The Congress has said that employees are protected in the exercise of such concerted activity. We respectfully suggest that the Board's refusal to protect the activity should be examined and reversed.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 27th day of February, 1964, a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon counsel for Respondent and Intervenor by depositing same in the United States mail with sufficient air mail postage affixed, addressed to:

NATIONAL LABOR RELATIONS BOARD,
Attention: HON. MARCEL MALLET-PREVOST
Assistant General Counsel,
Washington 25, D. C.

WILSON, BRANCH, BARWICK & VANDIVER,
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By
L. N. D. WELLS, JR.

APPENDIX A-1

UNITED STATES OF AMERICA

Before the

National Labor Relations Board

Cases Nos. 12-CA-1021, 1022, 1023, 1025, 1026, 1027, 1028, 1060
Case No. 12-CA-1102

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.

and

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

WILLIE P. MAY

DECISION AND ORDER

On May 19, 1960, Trial Examiner Albert P. Wheatley issued his Intermediate Report in the above entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate

Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report, and supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent that they are consistent with the following decision and order.[1]

The Respondent is a common carrier and for years has carried on regular hauling operations by truck from and to the plants and mines of the Virginia-Carolina Chemical Corporation (herein called V-C). On May 22, 1959[2] the employees of V-C struck and formed a picket line at the entrance to the V-C premises. The strike lasted until August 1. As more fully described in the Intermediate Report, on June 2, the Respondent terminated seven of its drivers (Silvers, Spivey, V. Bennett, B. Bennett, J. Cooper, L. Cooper and Sewell), and on July 21, one driver (May) for refusing to carry out their assignments which required them to cross the picket line at V-C, although they remained on the job for the performance of all other work. Another driver, Krzanowski, when given the same assignment of June 24, left the job and went home. Upon his return to the plant on June 26, he was discharged on

[1] The Respondent's request for oral argument is denied as the record, including the briefs, adequately presents the issues and the positions of the parties.

[2] All dates hereafter are for the year 1959, unless otherwise specified.

the specific ground that he had left his work without notice to the Respondent.

The General Counsel relies in substance upon Section 502, of the Act which provides in part that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act." Specifically, the General Counsel takes the position that all 9 drivers, the complainants herein, refused to cross the V-C picket line because they believed in good faith that to accept such assignment would subject them to abnormally dangerous conditions in the course of their work. In these circumstances, the General Counsel contends, Section 502 provides protection to the 9 complainants, and their discharge therefore violated Section 8(a)(1) of the Act.

We need not decide whether, had there existed "abnormally dangerous conditions," Section 502 would afford affirmative protection to these complainants, for, upon careful consideration of all the pertinent evidence, we cannot conclude that the General Counsel has established the existence of such conditions.

It is necessary first to clarify the meaning of the term "abnormally dangerous conditions" as used in Section 502. We are of the opinion that the term contemplates, and is intended to ensure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working

conditions shown to exist by competent evidence might in the circumstances reasonably be considered "abnormally dangerous."[3] In this light, we turn to the evidence relative to the specific complainants.

We can dispose of Krzanowski's case at the outset. On the basis found by the Trial Examiner, we are satisfied that his case is distinguishable from the others with respect to the Section 502 allegation. When this driver was given the assignment to the V-C premises on June 24, he abruptly left the job and went home. He returned to work on June 26, stating that he had been sick and his truck had not been operating properly. In the circumstances, we find that Krzanowski was justifiably discharged for the specific reason that he left his work for about two days without notice or explanation to the Respondent in violation of a company rule.

Seven of the drivers were discharged on June 2. The background circumstances were as follows. Prior to the strike at V-C, Respondent hauled in or out of V-C from 60 to 90 loads a day. From the inception of the strike on May 22 until June 2, the V-C facilities were virtually shut down. During this period, 13 loads in or out of V-C were hauled by 10 of Respondent's drivers, of whom 3 are complainants under discussion.[4] On June 1, V-C notified Respondent it would reopen on a full scale and Respondent thereupon undertook to resume its normal

[3] See, e.g., *N.L.R.B. v. Knight Morley Corp.*, 251 F. 2d 753, 756, 757 (C.A. 6) and *Knight Morley Corp.*, 116 NLRB 140, 145, 154; *Burke v. Mesta Machine Co.*, 79 F. Supp. 588, 611.

[4] Namely, B. Bennett, J. Cooper, L. Cooper.

trucking operations. (As of June 2, Rockana alone had a complement of about 50 drivers.)[5] On June 2, the 7 drivers in question, among others were assigned to the V-C premises.

As detailed in the Intermediate Report, the incidents occuring between May 22 and June 2, adduced to show the existence of "abnormal danger" which would affect these complainants in crossing the V-C picket line, consisted of the following. Shortly before the strike commenced, drivers Spivey and B. Bennett were told by certain V-C employees not to cross the picket line in the event of a strike as "somebody would get hurt." Driver Shirley was stopped at the picket line, and after reporting to the Respondent, was escorted across the picket line by a deputy sheriff. Driver Francouer was stopped at the picket line and threatened by pickets. He proceeded to a nearby grocery store to telephone Respondent for advice. A "good dozen" pickets followed him into the store and threatened him; as he left the store he was shoved, swung at, and finally kicked in the "rear end." Driver Sewell was approached by 8 to 10 men while he was eating supper in a diner and was told, "I hope you boys are not planning to go in because if you do we ain't going to promise you what will happen."

In the early morning of June 2, six of these drivers, excluding Sewell, after generally discussing the matter among themselves and others, refused the assignment to drive through the V-C picket line.

[5]The record does not disclose how many drivers were employed by Redwing as of June 2.

They were promptly discharged. Sewell reported for work in the afternoon, being aware of the six who had turned down the assignment that morning. Sewell made the same decision and was terminated.*

On July 21, driver May received the assignment, refused and was discharged. As to May, we rely upon these particular circumstances. He had previously decided, in agreement with the other drivers on the morning of June 2, to refuse any assignment to cross the V-C picket line. On June 27, a Florida State court issued an injunction which, *inter alia*, restrained 10 individuals from further participation in the picketing at V-C upon finding that they had committed acts of violence on the picket line. Following the injunction until the date of May's refusal on July 21, only one specific incident of violence (the acid throwing) occurred—and, this occurred away from the picket line.

As already indicated, we have considered the evidence as to each of the complainants herein in light of the objective facts existing at the time each made his decision to refuse the assignment. In reaching our conclusion on the factual issues posed, we have in addition given weight to the evidence showing that between June 2 and August 1, when the strike ended, Respondent hauled in or out of V-C about 1800 loads in the process of which over

*It was not established that Sewell was aware of certain additional incidents which occurred during the morning of June 2 in connection with a convoy of 8 trucks which Respondent initially arranged to go into the V-C premises. These incidents, which are not described in the Intermediate Report, consisted of attempted blocking and cutting off the road of Respondent's trucks, cursing, threatening, and throwing objects at drivers, strewing nails on the road, and the firing of a shot by an unidentified source.

50 Respondent's drivers crossed the V-C picket line about 3600 times.

The threats and acts of violence which have been shown in this case are not in issue as such and in no sense are condoned. Unfortunately, some disorder is not unusual in any extensive strike.[7] Other resources and forums appropriately exist to prevent and remedy such transgressions. Our functions, of course, is limited to the allegations of the specific violation of the Act raised in the General Counsel's complaint.

In view of the criteria and circumstances related above, and on the record considered as a whole, we conclude that the pertinent evidence does not warrant a finding that there existed "abnormally dangerous conditions" within the meaning of Section 502, when the complainants (except Krzanowski) refused to perform their assigned work.

We are left then with virtually the precise situation as was involved in the *Auto Parts* case.[8] There an employee refused in the course of his assigned duties to cross a picket line at the plant of another employer, while continuing on the job for the performance of his other work. It was held in effect that the activity of the employee was unprotected. As "simply stated" by the Board, the employee's "conduct was a refusal to do the job for which he had been hired and a direct disregard of his employer's instructions. For such conduct he could

[7] See *Republic Steel Corp. v. N.L.R.B.*, 107 F. 2d 472, 479 (C.A. 3), cert. den. 309 U. S. 684.

[8] *Auto Parts Co.*, 107 NLRB 242.

properly be discharged"[9] On the same legal basis, therefore, irrespective of whether their activity was concerted, we find that, in refusing the assignment to cross the V-C picket line, the 8 complainants (excepting Krzanowski) engaged in unprotected conduct.

We shall accordingly dismiss the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D. C. Mar. 6, 1961.

Boyd Leedom, Chairman

Philip Ray Rodgers, Member

John H. Fanning, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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[9]For the principle that employees cannot insist on remaining at work on their own terms and conditions, or that partial or intermittent work stoppages are unprotected, see, e.g. *C. G. Conn Ltd. v. N.L.R.B.*, 108 F. 2d 390, 397 (C.A. 7); *N.L.R.B. v. Montgomery Ward & Co.*, 157 F. 2d 486, 496 (C.A. 8); *N.L.R.B. v. Kobler Co.*, 220 F. 2d 3, 10-12, (C.A. 7) enf'g 108 NLRB 207; *N.L.R.B. v. Rockaway News Supply Co.*, 197 F. 2d 111, 113, (C.A. 2), affirmed 345 U.S. 71.

UNITED STATES OF AMERICA

National Labor Relations Board

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

Cases Nos. 12-CA-1021, 1022, 1023, 1025, 1026, 1027 1028, 1060

Case No. 12-CA-1102

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.

and

TEAMSTERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

WILLIE P. MAY

Joseph V. Morgan and *James L. Jeffers*, for the General Counsel of the National Labor Relations Board.

Wilson, Branch and Barwick of Atlanta, Ga., by *Alexander E. Wilson, Jr.*, for Redwing Carriers, Inc., and Rockana Carriers, Inc.

Before: *Albert P. Wheatley*, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDATIONS—

Statement of the Case

This proceeding was heard before the undersigned Trial Examiner in Tampa, Florida, on March 14, 15, and 16, 1960. The issue litigated was whether Redwing Carriers, Inc. and Rockana Carriers, Inc. (herein referred to collectively as Respondent and separately as Redwing and Rockana, respectively) violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act). After the hearing the General Counsel and the Respondent filed briefs which the undersigned has considered.[1]

Upon the entire record and observations of witnesses the undersigned makes the following:

Findings and Conclusions

The Business of Respondent

Redwing and Rockana are separate Florida corporations located in Tampa, Florida, and are common carriers engaged in the hauling of liquid (petroleum) products and of dry freight (fertilizer, rock, etc.) products. During 1959 each corporation derived revenue in excess of $100,000 from hauling products outside the State of Florida or destined ultimately to points outside the State of Florida. For the purpose of this proceeding these corporations constitute a single employer within the mean-

[1] A document entitled "consent motion to correct the record" has also been filed and considered and is hereby granted.

ing of the Act and are referred to herein as Respondent. The evidence reveals that Respondent is engaged in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act and that the Board's requirements for the assertion of jurisdiction have been established.[2]

The Alleged Unfair Labor Practices Issue

In the course of normal business Respondent has for a number of years carried on regular hauling operations from and to plants and mines of Virginia-Carolina Chemical Corporation (herein referred to as V-C) located near Tampa, Florida. On May 22, 1959, International Chemical Workers Union, Local No. 36, AFL-CIO, called a strike among employees of V-C and picket lines were established at the Florida facilities of that corporation. Between May 22 and June 2, 1959, the hauling operations normally performed by Respondent from and to these facilities of V-C were reduced to occasional trips (rather than regular runs in and out of the plants and mines). On June 2, 1959, Respondent endeavored to resume its normal hauling operations from and to the facilities of V-C. On this occasion and thereafter some of Respondent's truck drivers refused to accept assignments requiring them to cross the picket lines at the plants and facilities of V-C and Respondent terminated their employment because of such refusals. The issue herein is whether such terminations were violative of Section 8(a)(1) of the Act.

[2]Respondent concedes that the operations here involved are within the jurisdiction of this Agency.

The Facts

As noted above, a strike among employees of V-C and picketing at the facilities of V-C started on May 22, 1959. A few days before the beginning of this strike and picketing the employees of Respondent were advised of the pending nature thereof and were advised that crossing the picket lines might lead to trouble.

On May 27, 1959 Rockana employee Donald E. Shirley was stopped at a picket line at V-C's property by about 125 pickets gathered there shouting "scab and picket line breaker" and taking moving pictures and asked not to cross the picket line "until something was straightened out." Shirley then left the picket line site and reported this incident to Respondent. He was advised by Respondent to wait and that someone would meet and give him safe passage through the picket line. Shortly thereafter he was escorted through the picket line by a deputy sheriff.

On May 29, 1959, Rockana employee Andre Francoeur (also called Frenchy) approached the picket line at one of the facilities of V-C intending to make a pickup. As he did so the pickets (between 25 and 30) "strung themselves across the road," blocking his passage. When Francoeur stopped, the apparent leader of the pickets "jumped on the running board" of Francoeur's truck and told him "it would be more healthy if" he turned "around and did not make the pickup." Francoeur then left the picket line site and went to a grocery store "about a quarter of a mile down the road" and tele-

phoned Respondent, reporting what had happened. He was advised to stay where he was and that someone would be sent to help him.

When Francoeur left the picket line site about a dozen pickets followed him to the grocery store. After his telephone call to Respondent these pickets milled about him in a menacing manner—calling him "scavenger" and threatening to assault him and crowding him out of the store and toward his truck —until Francoeur started to leave the grocery store site. As Francoeur started to leave, a couple of the pickets kicked at him, one of them actually making contact with Francoeur's body. Upon leaving the grocery store site Francoeur was followed by the pickets for about 2 miles. Upon returning to Respondent's place of business Francoeur reported to Respondent and to his fellow employees what had happened.

On May 29, 1959, Rockana employee John T. Sewell was approached by 8 to 10 men, in a diner near the facilities of V-C and asked if he was the driver of the Rockana truck parked outside. When Sewell responded in the affirmative he was told "I hope you boys are not planning on going in [to V-C] because we are on strike and if you do we ain't going to promise you what will happen." Sewell replied "if that is the way it is I am not going in there" and was told "well that is the way it is." As Sewell left the diner, the men who had spoken to him stated "you boys be sure and watch your steps." The following day Sewell reported this incident to other drivers for Respondent (J. F. Cooper, Buie Bennett

and possibly to Melvin B. Spivey). Audrey Cribbs, another Rockana driver present in the diner, also testified with respect to this matter. His version of this incident varies from that given by Sewell in that he testified that the men suggested, without accompanying threats, that Respondent's employees not cross the picket line. On the basis of observation of witnesses and evaluation and the weighing of evidence the undersigned believes and finds that Sewell's version is more reliable than that given by Cribbs.

As noted above, on June 2, 1959, Respondent endeavored to resume normal hauling operations from and to the facilities of V-C. Accordingly, when its drivers reported for work on that date some of them found assignments directing them to these facilities. These drivers (and others) then conferred among themselves, discussing the assignments and the strike at the facilities involved. They anticipated that if they tried to cross the picket lines they would be placing themselves in danger of harm to themselves and damage to Respondent's equipment and decided not to cross the picket lines.[3] Supervisors for Respondent, including Respondent's president, Charles E. Mendez, were informed of this decision and the reasons therefore and these supervisors endeavored to persuade the drivers to go ahead and carry out their assignments, crossing the picket

[3]Respondent contends that the decision not to cross the picket lines was "individual" rather than "concerted" activity because the witnesses testified they made up their own minds not to cross the picket lines. In the light of the record this appears to be an "afterthought." In any event, any such contention is hereby rejected. It is clear from the record herein that the decision to refuse and the refusal, to cross the picket lines on June 2, 1959, was group or concerted activity and was treated as such by Respondent.

lines where necessary. Six drivers (William G. Silvers, Melvin B. Spivey, Vernon Bennett, Buie Bennett, James F. Cooper, and Lonnie Cooper) remained steadfast in their decision and were terminated. That afternoon when driver John T. Sewell reported for work he was given an assignment requiring him to cross the picket lines and he refused because of the anticipated bodily harm and his employment was terminated by Respondent.[4] There is a conflict of evidence herein as to whether Respondent's supervisors were informed that the drivers' decision not to cross the picket lines was because of their apprehension about harm to themselves or because they (the drivers) were averse to crossing any picket lines. As noted above, the undersigned finds that Respondent was informed that it was because of the aforementioned apprehension. In making these credibility resolutions the undersigned has considered the attitude, character and interest of each of the testifiers in the light of the situation as a whole as the evidence reveals it and inherent probability.

On Wednesday, June 24, 1959, Redwing driver William Krzanowski was given an assignment directing him to the facilities of V-C then being picketed. Upon receipt of this assignment Krzanowski remarked to Respondent's assistant dispatcher Feltz "Don't you know those boys are mean out there, they might hurt me" and then left Respondent's premises in his own automobile. Krzanowski did not report for work or call in on Thursday. On Friday, June 26, 1959, Redwing dispatcher James

[4]The duties of the terminated drivers were transferred to nonobjecting employees and thus Respondent maintained its operations.

R. Cunningham asked Krzanowski "What happen to you yesterday?" and Krzanowski replied that he was sick. Cunningham then indicated to Krzanowski that his services were being terminated and that he should turn in certain safety equipment issued to drivers when they are first employed by Respondent. Later that morning Krzanowski was told by Redwing's assistant dispatcher Feltz that he (Krzanowski) should have taken the assignment to the V-C's facilities and that someone else had taken it and Krzanowski replied he did not have to take it. Krzanowski testified that his decision not to cross the picket lines was his own decision and that he did not discuss whether or not he was going to cross the picket lines with anyone. There is no evidence herein that Krzanowski either before or after his termination acted in unison with other drivers for Respondent except for the fact that he did not cross the picket lines and the fact that he indicated that he anticipated physical harm if he attempted to do so. However, his refusal to cross the picket lines (unlike the refusal of the drivers on June 2) was not clearly stated to Respondent. At the time he left the dispatcher's office Respondent did not know whether he was going to perform his assignment or walk away without doing such. As noted above, he did the latter. Also, as noted above, it is not clear that Krzanowski's services were terminated for refusal to perform the assignment requiring him to cross the picket lines. From the record, one of two inferences appear applicable—that he was terminated for leaving his truck without notice or that he was terminated for refusing to cross the

picket lines. While the undersigned has some doubts about the matter, he believes (and finds) that the weight of the evidence establishes the former rather than the latter.

On June 2, 1959, Redwing driver Willie P. May conferred with other drivers for Respondent and agreed that he would not carry out any assignment requiring him to cross the picket lines at V-C. On July 21, 1959, May was given such an assignment but did not recognize it as such until after he had left Respondent's premises. While enroute to his destination (a location not familiar to him) it occurred to him that possibly he was being sent to a V-C facility. At that point May telephoned Respondent's assistant dispatcher Feltz and inquired whether he was being directed to V-C facilities. Upon receiving an affirmative reply he told Feltz that he was "afraid to go out there" and that he would return Respondent's truck at once, which he did. When he got back to Respondent's premises May told Redwing dispatcher Cunningham substantially the same thing he had told Feltz and was told that Respondent did not have something else for him. May made it clear that he was only refusing assignments requiring him to go to V-C facilities and that he would go anywhere else. May asked Cunningham whether he should turn in his equipment and was told to do as he pleased. He did turn it in. Respondent's answer herein admits that May was terminated on or about July 21, 1959, and in a letter to this Agency's Regional Director Respondent asserts May was dismissed for failure to carry out his assignment on July 21, 1959.

There is no evidence herein indicating antiunion animus or antipathy toward the employees for their concerted activity and, as noted above, the evidence reveals that the terminations were not impelled by such considerations, but by economic considerations.

Conclusions

The General Counsel asserts that the activities of the drivers herein were an exercise of rights guaranteed in Section 502 of the Act[5] and that this section of the Act limits the right of an employer to require continuance of work under what the employees in good faith believe to be abnormally dangerous conditions no matter how economic the employer's motivation may be. He relies primarily upon the doctrine announced in *Knight Morley Corporation.*[6]

It appears that Section 502 was inserted into the Act as a protection to those prevented from striking by virtue of no-strike clauses of contracts or by virtue by Section 8(d) of the Act (see *Knight Morley Corporation, supra*) and it is questionable whether it applies in situations such as is involved herein, where there is no collective bargaining contract in effect. Assuming, *arguendo*, it is applicable, it appears that the principle announced in the *Knight Morley* case would apply herein although

[5]Sec. 502 provides, "* * * nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

[6]See *N.L.R.B. v. Knight Morley Corporation*, 41 LRRM 2242, enforcing 116 NLRB 140.

there is a major factual difference other than the existence and nonexistence of a contract. In the *Knight Morley* case the conditions giving rise to the employee activities were of a fixed and continuing nature and were such that they created an actual constant threat to health. Here the conditions were sporadic and uncertain and it was speculative whether employees would be subjecting themselves to harm by going into the area. The language of Section 502 with reference to good faith suggests that employees are not required to wait until abnormally dangerous conditions are an actual constant and continuing threat and that they may act under a good faith belief that such conditions exist as well as when such conditions actually exist and the rationale of the *Knight Morley* case appears applicable in either situation. It is believed that the evidence adduced herein establishes a good faith belief which has not been overcome by evidence that abnormally dangerous conditions did not exist.[7]

Assuming, *arguendo,* that Section 502 is not aplicable, questions arise as to whether the drivers' activity here involved was concerted activity, whether it was concerted activity protected by the Act and, if these issues are answered in the affirmative, the problem involved is one of balancing the conflicting interests and rights and determining whether the employer's right to operate its business must give way to the employee's right to engage in concerted activities.[8]

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[7]See *Wichita Television Corporation*, 122 NLRB 222, 226.

[8]A problem which the Supreme Court noted but did not answer in *N.L.R.B. v. Rockaway News*, 345 U. S. 71.

As previously noted, except in the situation involving Krzanowski the undersigned believes and finds that the driver's activity here involved was concerted rather than individual activity. Section 7 of the Act recognizes a right of employees to work together for their mutual aid or protection. As noted in the dissenting opinion in the Rockaway News case, it is a time honored custom for employees to help one another by refraining from crossing picket lines. That is what the drivers herein were doing. Futhermore, they were seeking conditions of employment for themselves which did not require them to cross picket lines where violence prevailed —an activity intimately connected with their own immediate employment. In view of the foregoing, the undersigned believes, finds and concludes that the activity here involved was concerted activity protected by the Act. See *Washington Aluminum* Company, Inc., 126 NLRB No. 162

The problem now for determination may be stated: Must an economically motivated employer's right to operate its business give way to the concerted activities protected by the statute? The cases bearing upon this issue indicate that the answer is in the affirmative. The Board's rationale is set forth in *Cyril de Cardova & Bro.*, 91 NLRB 1121. See also dissenting opinion in *Rockaway News*, *supra*. In short, the authorities hold that an employer's desire to operate its business cannot serve as justification for infringing the rights which the Act guarantees to employees.

Redwing and Rockana are common carriers sub-

ject to the Interstate Commerce Commission and to the Florida Railroad and Public Utilities Commission and it may be argued that the duties imposed on these carriers required them (and through them the drivers) to cross the picket lines involved. It is not clear whether such duty is imposed. Assuming, however, that the carriers had an obligation to provide services under the conditions then prevailing it would seem that then restrictions similar to those imposed by no-strike clauses of contracts would be placed upon employees and that in that event it would be appropriate to apply Section 502 and the *Knight Morley* doctrine and thus effectuate the policy of Congress of not requiring continuance of work under what the employees in good faith believe to be abnormally dangerous conditions. If the duties imposed upon carriers by the aforementioned commissions requires carriers to cross picket lines where violence prevails and Section 502 does not apply, then an apparent conflict of requirements exists and in balancing this conflict (and the conflict of interests and rights previously noted) it appears appropriate to consider the intent of Congress as expressed in Section 502 and, in view thereof, to resolve the conflicts against the carriers.

In summary, the Act gives employees, acting in concert and in the face of abnormally dangerous conditions, a right to quit their labor without penalty (either in the face of a no-strike clause or where there is no such clause) in order to protect their health and their lives.

In view of the foregoing, the undersigned finds

and concludes that, except in the situation involving Krzanowski, the activity of the drivers herein in refusing to cross the picket lines at V-C was protected concerted activity and that their terminations were therefore unlawful.

As previously indicated, the undersigned concludes that the evidence adduced does not establish that Krzanowski was terminated in violation of the Act.

Ultimate Findings and Conclusions

In summary, the undersigned finds and concludes:

1. The evidence adduced in this proceeding satisfies the Board's requirements for the assertion of jurisdiction herein.

2. The evidence adduced establishes that Respondent, by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. The aforesaid activities are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The evidence adduced does not establish that Respondent violated the Act by terminating the services of William Krzanowski.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record

in this matter, the undersigned recommends that Redwing Carriers, Inc. and Rockana Carriers, Inc., their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act by discriminating in regard to their hire or tenure of employment or any term or condition of employment.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to William G. Silvers, Melvin B. Spivey, Vernon Bennett, John T. Sewell, Buie Bennett, James F. Cooper, Lonnie Cooper and Willie P. May immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed;

(b) Make whole William G. Silvers, Melvin B. Spivey, Vernon Bennett, John T. Sewell, Buie Bennett, James F. Cooper, Lonnie Cooper and Willie P. May for any loss of pay they may have suffered by reason of the terminations of their employment;*

(c) Preserve and make available to the Board or to its agents, upon request, for examination or copying, all payroll records, time records, social security payment records, employees' income tax

*The loss of pay shall be computed in accordance with the customary formula of the National Labor Relations Board.

report records and all other records and reports necessary or useful to determine the amounts of monies due under the terms recommended in this Report;

(d) Post at its place of business in the vicinity of Tampa, Florida, copies of the notice attached hereto as Appendix A. Copies of such notice to be supplied by the National Labor Relations Board's Regional Director for the Twelfth Region, shall, upon being duly signed by a representative of Respondents, be posted upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by other material;

(e) Notify the aforementioned Regional Director for the Twelfth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report what steps Respondents have taken to comply with the recommendations herein made.

It is further recommended that the allegations of the complaint to the effect that Respondents unlawfully discharged William Krzanowski be dismissed.

It is further recommended that unless exceptions are filed in accordance with the rules and regulations of this Agency, the National Labor Relations Board adopts the findings, conclusions and recommendations herein contained, and issue an order requiring the foregoing recommended action.

Dated at Washington, D. C. this day of May 1960.

Albert P. Wheatley
Trial Examiner

/s/ ALBERT P. WHEATLEY

APPENDIX A-2

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 12-CA-1021, 1022,
1023, 1025,
1026, 1027,
1028, 1060

REDWING CARRIERS, INC.
and
ROCKANA CARRIERS, INC.

and

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

SUPPLEMENTAL DECISION AND ORDER

On March 6, 1961, the Board issued a Decision and Order in this case,[1] finding that Respondents had not engaged in unfair labor practices, and dismissing the complaint in its entirety. Thereafter, Teamsters, Chauffeurs & Helpers Local Union No. 79, et al., one of the Charging Parties, filed a petition with the United States Court of Appeals for the District of Columbia, requesting review of the Board's Order. A joint designation of record was

[1] 130 NLRB 1208.

filed with the court, as well as a brief by petitioner Local Union No. 79.

On February 5, 1962, the Board filed a motion with the aforesaid court, seeking to have the case remanded to the Board for further consideration. No objection was raised by Respondents, and, on February 21, 1962, the Board's motion was granted *per curiam* and the case remanded.

The Board has reconsidered its original decision, and hereby reaffirms that decision, except as modified herein.

The Board, in its original decision, found, *inter alia*, that certain employees of Respondents engaged in unprotected conduct when they chose in the course of their employment to honor a picket line at the premises of another employer. As set forth more fully in the original decision, these employees were permanently assigned to make deliveries to Virginia-Carolina Chemical Corporation. When they decided on June 2 not to cross the picket line established by Chemical Workers at Virginia-Carolina, their services were terminated by Respondents, who within a day or two replaced them with other drivers, including several new employees.[2]

In the earlier decision, the Board cited the *Auto Parts Co.*[3] case for the proposition that the activity of these employees, as described above, was unpro-

[2] One driver, though deciding with the group on June 2 not to cross the picket line, was not given a V-C assignment until July 21, at which point he refused and was told by Respondents they had "nothing else for him."

[3] *Robert H. Snow, d/b/a Auto Parts Co.*, 107 NLRB 242.

tected. A re-examination of that case indicates, however, that the Board there carefully avoided characterizing such activity as either protected or unprotected, but merely found that the employer did not violate Section 8(a)(3) by discharging its driver, Shuman, in the circumstances of that case.[4] Moreover, other Board cases on the same point have indicated to the contrary, namely, that employees engage in protected concerted activity when they respect a picket line established by other employees.[5] Such activity is literally for "mutual aid or protection," as well as to assist a labor organization, within the meaning of Section 7. Contrary to the language of the Board's former decision, therefore, we find that the employees of Redwing engaged in protected concerted activity when they refused to cross the Virginia-Carolina picket line.

Although the Act accordingly prohibits any reprisal against the eight Redwing drivers for engaging in the protected activity of not crossing the V-C picket line, we also recognize that the Respondents had a corresponding right which must be balanced against the right of the employees. That is,

[4]The Board in *Auto Parts* specifically found it "unnecessary to adopt the various rationales set out in the Intermediate Report." *Id.* at p. 242. The Trial Examiner had held expressly that employee Shuman had not engaged in a concerted activity for mutual aid or protection when he chose not to cross a picket line established by his union at another location.

[5]*Cyril de Cordova*, 91 NLRB 1121; *Cone Brothers Contracting Co.*, 135 NLRB No. 18. And see *Illinois Bell Telephone Co.*, 88 NLRB 1171, enf. den. 189 F. 2d 124 (C.A. 7), cert. den. 342 U.S. 885. See also *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503, 505-506 (C.A. 2). A similar question was presented in *Rockaway News Supply Co., Inc.*, 95 NLRB 336, where the Board expressly held such activity a protected form of concerted activity. The Court of Appeals for the Second Circuit agreed with the Board on this point, but denied enforcement on another theory. 197 F. 2d 111. The Supreme Court affirmed the Second Circuit's conclusion, in effect on the grounds that the activity in question was itself in breach of an operative no-strike agreement. 345 U.S. 71.

Respondents had a right to attempt to run their business despite the sympathetic activities of the drivers here involved.[6] In this context, the Board has in the past drawn a distinction between replacement and discharge of such employees whose sympathies prevent them from performing assigned work tasks.

In considering the continued validity of the discharge-replacement distinction in this situation, we are convinced that substance, rather than form, should be controlling. That is, where it is clear from the record that the employer acted only to preserve efficient operation of his business,[7] and terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work, we can see no reason for reaching different results solely on the basis of the precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question.

This same point was made by both the Supreme Court and the Court of Appeals for the Second Circuit in *Rockaway News, supra*. The Board had there held that the employer could lawfully have required its employee to elect the status of a striker and replace him, but held in addition that the employer violated the Act by "discharging" him. The Second Circuit commented:

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[6]See, e.g., *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345.

[7]See, e.g., *Auto Parts Co., supra*, p. 242, ftn. 2.

> We cannot follow the Board's reasoning. . . . We think that the Board is wholly unrealistic in the distinction which it seeks to make between the discharge of Waugh for refusing to carry his newspapers across the picket line, which it stamps as unlawful, and the suggested replacement of him as a striker . . . , which it thinks would have been perfectly all right.[8]

The Supreme Court in its decision stated even more pointedly:

> The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *N.L.R.B. v. Mackay Co.*, 304 U.S. 333,347. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.[9]

We have reexamined the record in this case, and find it clear that, insofar as Respondents may actually have "discharged" the eight drivers, they did so entirely for the purpose of continuing their business operations. Redwing's president, Charles Mendez, testified that on June 2, when the drivers refused to cross the V-C picket line, he transferred other men from their normal jobs to make these

[8] *Supra*, 197 F. 2d at p. 115.
[9] *Supra*, 345 U.S. at p. 75.

deliveries, and in addition hired new men to replace them, both on June 2 and June 3. Dispatcher Pierola confirmed that he immediately called in other drivers from different runs to handle the V-C assignments, and several of the drivers themselves, including Bennett and Spivey, testified they were told by Mendez that he had no alternative but to replace them with other drivers. In view of the above, and the absence of any evidence of union animus on the part of Respondents, we are convinced that Respondents terminated the services of the eight drivers not in reprisal for honoring the V-C picket line, but solely to continue their business dealings with V-C. Under these circumstances, and on these grounds alone, we reaffirm our original disposition of this case, and dismiss the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D. C. JUL 20 1962

NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS and BOYD LEEDOM, MEMBERS, concurring:

For the reasons stated in the original Decision and Order in this case (130 NLRB 1208), we concur in the result.

Dated, Washington, D. C. JUL 20 1962

NATIONAL LABOR RELATIONS BOARD

APPENDIX A-3

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,415

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.,

Intervenors.

On Petition to Review and Set Aside an Order and Supplemental Order of the National Labor Relations Board
Decided December 5, 1963

Mr. L. N. D. Wells, Jr., with whom *Mr. David Previant* was on the brief, for petitioner. *Mr. Hugh Hafer* also entered an appearance for petitioner.

Mr. Melvin Pollack, Attorney, National Labor Relations Board, with whom *Messrs. Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Mr. Alexander E. Wilson, Jr., with whom *Mr. Robert T. Thompson* was on the brief, for intervenors.

Before DANAHER, BASTIAN and MCGOWAN, Circuit Judges.

BASTIAN, *Circuit Judge*: On June 10, 1961, The Teamsters, Chauffeurs & Helpers Local Union No. 79, petitioners, filed in this court a petition to review and set aside a decision and order of the National Labor Relations Board finding that Redwing Carriers, Inc. and Rockana Carriers, Inc. (hereinafter referred to as "the employers") had not engaged in unfair labor practices and dismissing the complaint in its entirety. After the filing of a brief by the union, the Board moved that the case be remanded to it for further consideration and, no objection having been filed, the case was so remanded.

In the original decision appealed from, the Board had found that certain employees of the employers had engaged in unprotected conduct when certain drivers refused to cross a picket line established by the Chemical Workers Union at the premises of Virginia-Carolina Chemical Corporation. These employees had been assigned to make deliveries to Virginia-Carolina but declined to cross the picket line, whereupon their services were terminated by the employers *and new employees were hired*. The Board held that the activity of the original employees was *unprotected*, and further found that the employers had not violated §8(a)(1) of the National Labor Relations Act by discharging those employees, and that "abnormally dangerous condi-

tions," within the meaning of §502 of the Act,[1] did not prevail when the employees refused to perform their assigned work.

On remand the Board, by a three to two majority, found that the employees had in fact engaged in *protected* concerted activity when they refused to cross the picket line, but held:

> "Although the Act, accordingly prohibits any reprisal against the eight Redwing drivers for engaging in the protected activity of not crossing the V-C picket line, we also recognize that the Respondents had a corresponding right which must be balanced against the right of the employees. That is, Respondents had a right to attempt to run their business despite the sympathetic activities of the drivers here involved."

The Board further held:

> "We have reexamined the record in this case, and find it clear that, insofar as Respondents may actually have 'discharged' the eight drivers, they did so entirely for the purpose of continuing their business operations."

The Board concluded:

> "In view of . . . the absence of any evidence of union animus on the part of Respondents, we are convinced that Respondents terminated the services of the eight drivers not in reprisal for honoring the V-C picket line, but solely to continue their business dealings with V-C. Under these circumstances, and on these grounds

[1] Labor Management Relations Act §502, 61 Stat. 162 (1947), 29 U.S.C. §143 (1958).

alone, we reaffirm our original disposition of this case, and dismiss the complaint in its entirety."

While the Board, in its original order, had found that no "abnormally dangerous conditions" existed, it did not do so *in haec verba* in its supplemental order. It did, however, adhere to its original decision except insofar as the conduct of the discharged employees had been held to be unprotected. All members of the Board concurred in the result, although two members adhered to the position taken by them on the original order.

We think it clear that there is adequate support in the record, considered as a whole, to support the findings of the Board and it follows accordingly, that the petition to set aside the order and supplemental order of the Board must be denied. Cf. *N.L.R.B. v. Rockaway News Supply Co.*, 197 F 2d 111 (2d Cir. 1952), *aff'd on other grounds*, 345 U.S. 71 (1953).

So ordered.

APPENDIX B

STATUTES INVOLVED:

Taft-Hartley; 29 U.S.C. §§151 ff

Section 2(3) of the Act provides: (29 U.S.C. 152(3))

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 2(9) of the Act provides: (29 U.S.C. 152(9))

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, re-

gardless of whether the disputants stand in the proximate relation of employer and employee."

Section 7 of the Act provides: (29 U.S.C. 157)

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(1) of the Act provides: 29 U.S.C. 158(a)(1)

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 8(b)(1) of the Act provides: 29 U.S.C. 158(b)(1)

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or

(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

Section 8(b)(4) of the Act provides, in part, as follows: 29 U.S.C. 158(b)(4)

"It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

"'(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

"Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Section 13 of the Act provides: 29 U.S.C. 163

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Section 502 of the Act provides:

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

REDWING CARRIERS, INC., AND ROCKANA CARRIERS, INC.,
Intervenors.

BRIEF OF REDWING CARRIERS, INC. AND ROCKANA CARRIERS, INC., AS INTERVENORS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
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REDWING CARRIERS, INC., AND ROCKANA CARRIERS, INC.,
Intervenors.

BRIEF OF REDWING CARRIERS, INC. AND ROCKANA CARRIERS, INC., AS INTERVENORS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I. INTRODUCTORY STATEMENT

Redwing Carriers, Inc., and Rockana Carriers, Inc., were the respondents when this case came before the Na-

tional Labor Relations Board for hearing. By Order of the United States Court of Appeals for the District of Columbia dated July 27, 1961, Redwing Carriers, Inc., and Rockana Carriers, Inc., were granted leave to participate in these proceedings as Intervenors.

The National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*, is hereinafter referred to in this brief as the "Act".

References to the Joint Appendix are noted as "JA" and references to the Supplemental Appendix are indicated by the abbreviation "Supp. App.".

II. STATEMENT OF THE CASE

The Intervenors, Redwing Carriers, Inc., and Rockana Carriers, Inc., are motor vehicle common carriers subject to the regulation by the Interstate Commerce Commission and the Florida Railroad and Public Utilities Commission. (JA 148)

For many years Virginia-Carolina Chemical Corporation has been a continuous customer of both Intervenors (JA 149) and obviously a customer of rather substantial proportions. Virginia-Carolina Chemical Corporation was engaged in a labor dispute with its own employees with a strike developing out of this situation on about May 22, 1959. From that date until about June 2, 1959, the operations of Virginia-Carolina were curtailed with little need for the Intervenors' transportation services to and from the Virginia-Carolina premises. On about June 1, 1960, the officials of Virginia-Carolina informed the carriers that they expected to resume operations the next day and would need regular transportation service. (JA 173) Pursuant to their legal obligations to provide transportation the In-

tervenors undertook to provide the required services. At this time there had been but a few isolated incidents of violence or threats of violence in connection with the dispute at Virginia-Carolina.

On June 2, 1959, the Intervenors dispatched a number of drivers to the premises of Virginia-Carolina for the purpose of picking up freight. Eight drivers refused to carry out this assignment. The evidence seems clear that the drivers refusing to perform work assigned to them did so for reasons other than fear of bodily harm. A vast majority of the Intervenors' drivers, however, carried out their assignments and continued to do so throughout the duration of the Virginia-Carolina labor dispute.

The drivers who refused to carry out their assignments were terminated from their employment by the Intervenors. A charge was filed and a complaint issued alleging that the Intervenors had violated Section 8(a)(1) of the Act by terminating these employees. The Trial Examiner concluded that Section 502 of the Act gave these drivers the right to refuse to perform these particular assignments and therefore their termination constituted a violation of Section 8(a)(1).

In its initial Decision and Order of March 6, 1961,[1] the National Labor Relations Board reversed the findings of the Trial Examiner concluding that it had not been shown that "abnormally dangerous conditions for work" existed as provided in Section 502 of the Act and further that the refusal of the drivers to perform a part of their work constituted insubordination which is not protected by the Act. In this decision the Board did not reach the question whether Section 502 does grant positive rights which can

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1. 130 NLRB 1208.

be made the subject matter of unfair labor practices under Section 8(a)(1) of the Act.

Contrary to the initial holding, in its Supplemental Decision and Order of July 20, 1962,[2] the Board found that the involved employees had engaged in protected concerted activity in refusing to cross the Virginia-Carolina picket line. The Board unanimously reached the same result, however, as in the initial holding by concluding that the Intervenors' act in replacing or terminating the drivers was entirely for the purpose of continuing business operations. In so finding the Board properly pointed out that the Intervenors immediately secured replacements for the drivers in question and also that there was no evidence of anti-union animus by the Intervenors. The Board in its supplemental holding also points out that the termination appeared to be not in reprisal for the drivers' refusal but to enable the Intervenors to continue their business dealings with Virginia-Carolina.

In affirming the findings of the National Labor Relations Board the United States Court of Appeals for the District of Columbia concluded that, from the record as a whole, adequate support for the Board's conclusions was clearly shown. The Court cited *N.L.R.B. v. Rockaway News Supply Co.*, 197 F.2d 111 (C.A.2, 1952), *aff'd. on other grounds*, 345 U.S. 71 (1953), as supporting authority.

III. QUESTION PRESENTED

The ultimate question of course is whether the Court of Appeals properly affirmed the Board's holding that an employer does not violate Section 8(a)(1) of the Act by discharging employees for refusing to accept assignments

2. 137 NLRB 1545.

requiring them to cross a picket line at the premises of another employer. In conclusion of this question, however, several important and directly related principles require careful consideration. These principles may be briefly stated as follows:

(A) Rights established by Section 7 of the Act must be balanced against an employer's corresponding right to operate his business.

(B) The discharge of employees engaging in such concerted activities as found in this case must be for the purpose of discouraging these activities to be in violation of Section 8(a)(1) of the Act.

IV. PRELIMINARY STATEMENT

The surprising contentions of the Petitioner may be briefly summarized in these words: The established rights of a private business to take such noncoercive action as may be necessary to insure its economic welfare must be completely and totally disregarded where the Labor Management Relations Act of 1947 is concerned.

The principle underlying this proposition, in its various forms, has been placed in issue an untold number of times over the years. Probably the first point of contact was where established private rights to operate one's own business, unrestrained, came into conflict with the first law devised to regulate some aspect of the free enterprise system. Admittedly the Labor Management Relations Act of 1947 was directed to the encouragement of collective bargaining. This does not mean, however, that those provisions of the law attendant to such purposes are so absolute as to slay the prime source of any unions' existence, *i.e.*, private enterprise.

V. ARGUMENT

A. Rights Established by Section 7 of the Act Must Be Balanced Against an Employer's Corresponding Right to Operate His Business.

The Act undeniably prohibits reprisal against employees who exercise rights guaranteed in Section 7. This is not to say, however, that the guarantee of such rights must be mechanically applied or that such rights are immutable and must not on occasion give way to conflicting rights. This Court in a recent utterance commented in a closely related context that mechanical answers will not avail for the solution of nonmechanical complex problems in labor-management relations. See *NLRB* v. *United Steelworkers of America and Nutone*, 357 U.S. 357, 364. And as the Board correctly reasoned in its decision a balance must be struck if conflicting rights stand opposed.

In its considerations as to the validity of an employer's "no solicitation rule" the Court in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. at 797-798, summarized the perspective in which conflicting employer-employee rights must be viewed in these words:

> "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self organization assured to the employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."

Employee rights are subject not only to the specific limitations imposed by Section 8 of the Act but these rights are also subject to other limitations. In regard to the right to strike the Court stated in *NLRB* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240, 256:

> "Section 13 provides that nothing in the Act, 29 USCA Section 163, 'shall be construed so as to interfere with or impede or diminish in any way the right to strike'. But this recognition of 'the right to strike' plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work."

And neither did the Act make legal a strike that ran afoul of Federal law, *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31; nor one in violation of a contract made pursuant thereto, *NLRB* v. *Sands Manufacturing Co.*, 306 U.S. 332, nor one creating a national emergency, *United States* v. *United Mine Workers*, 330 U.S. 258.

The Courts and the Board have consistently held that Section 7 of the Act does not grant unlimited rights to employees. In *NLRB* v. *Draper Corporation*, 145 F.2d 199, 202 (C.A. 4, 1944), the Court said:

> "The purpose of the Act was not to guarantee to employees the right to do as they please but to guarantee to them the right to collective bargaining for the purpose of preserving industrial peace."

See also *Joanna Cotton Mills* v. *NLRB*, 176 F.2d 749 (C.A. 4, 1949); *NLRB* v. *Illinois Bell Telephone Co.*, 189 F.2d 124 (C.A. 7, 1951); *Southern Steamship Co.* v. *NLRB*, *supra*; *NLRB* v. *Reynolds International Pen Co.*, 162 F.2d 680, 683 (C.A. 7, 1947).

In the case of *NLRB* v. *Montgomery Ward*, 157 F.2d 486 (C.A. 8, 1946), the Circuit Court concluded:

> "While these employees had the undoubted right to strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work."

And even in early National Labor Relations Board decisions it was recognized that there were limitations upon the rights guaranteed to employees by Congress. In the matter of *Peyton Packing Co., Inc.*, 49 NLRB 828, 843, the Board pointed out the following:

> "The Act of course does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose."

In a later Board case in the matter of *Robert H. Snow, d/b/a Auto Parts Company*, 107 NLRB 242 (1953), involving a truck driver employee's refusal to cross picket lines at the place of business of other employers, the Board stated:

> "However viewed and simply stated, Shuman's (a driver) conduct was a refusal to do the job for which he had been hired and a direct disregard of his employer's instructions. For such conduct he could properly be discharged."

In *Rockaway News Supply Co., supra*, the Second Circuit outlined the correct solution to the issue here before the Court in these revealing words:

> ". . . an employee is of course free to refuse to cross a picket line when he is on his own time and his discharge for so doing would doubtless be a violation of Section 8(a)(1). But he is not free to exercise the right during his working time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to cross the picket line. To hold otherwise would be to permit an employee to unilaterally dictate the terms of his employment which is well settled he may not do."

And as here where the Intervenors' actions were motivated only by a desire to continue efficient operations and its duty to fulfill its legal and economic obligations to its customers, a mechanical application of Section 7 would neither be in the public interest nor be supported by the holdings of the Board and the courts.

B. The Discharge of Employees Engaging in Concerted Activities As Found in This Case Must Be for the Purpose of Discouraging Such Activities to Be in Violation of Section 8(a)(1) of the Act.

Perhaps the most striking aspect of this case is the complete absence of anti-union animus, or any evidence for that matter that the Intervenors acted for illegal purposes. The holding upon which the appellants appear to have grounded its contentions, *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, very clearly indicates that decision was based upon the fact the employees discharged therein were disciplined because they engaged in a concerted walkout rather then the employer's desire to continue business operations, a situation completely dissimilar to the matter here before the court. The employees involved in Washington Aluminum walked out because of the intense cold at the plant in which they were employed.

The facts are quite clear that the actions of the management were taken in retribution for the walkout and not for the purpose of continuing its operations. And neither was *Washington Aluminum* management faced with the peculiar legal obligations of a common carrier. In fact, a manufacturing enterprise such as the Washington Aluminum Company may close down its operations whenever necessary, whereas pursuant to both State and Federal regulations, a common carrier must continue to offer its services to the public regardless of the difficulties encountered.

The Petitioner further contends that Section 7 rights are absolute except in a few explicit, well defined areas and urges that *NLRB* v. *Washington Aluminum, supra,* so holds. The language of the decision fails to support such views. In *Washington Aluminum,* the court makes this comment:

> "It is of course true that Section 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent, or in breach of contract. . ."

It is obvious from the court's language that it was not intended as an attempt to make an all inclusive delineation of the types of Section 7 concerted activities which cannot be protected under the Act. The Court indicated only that the concerted activities in that particular case were not such as would fall within what the court considered "normal" categories of unprotected activities. An obvious exception to the Petitioner's proposition that Section 7 rights are "almost absolute" is found in the court-tested right of employers to restrict organizational solicitation on

company property where such rules are made in the interest of production, order and discipline.[3]

The Petitioner further appears to contend support in the Board's recent decision in the matter of *L. G. Everist, Inc.*, 142 NLRB 20 (1963) and in the Circuit Court's holding in *NLRB* v. *Cone Brothers Contracting Company*, 317 F.2d 3 (C.A. 5, 1963). Neither case may be termed persuasive authority relative to the issues here under consideration.

The Board's decision in *L. G. Everist, Inc.*, was based upon the employer's failure to reinstate employees who engaged in what was held to be "protected concerted activities" rather than a "discharge" to continue business operations. The Board made no ruling upon the merits of the "discharge" but nevertheless did indicate that its ruling there under review would be controlling. At any rate the Board's ruling in *L. G. Everist* has absolutely no application here. The legal principles to be applied to a refusal to reinstate "striking" employees upon timely applications obviously are completely dissimilar to those appropriate in this case. Significantly lacking in *L. G. Everist* are conflicting employer and employee rights, but even more significantly there is found in *Everist* a background of anti-union activity occurring both prior and subsequent to the employer's refusal to reinstate.

Even a casual reading of the Circuit Court's decision in *NLRB* v. *Cone Brothers Contracting Co., supra*, fails to offer support to the Petitioner's assertions. The Court found ample evidence in that case of anti-union bias and illegal purpose, stating as follows:

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3. *NLRB* v. *United Steelworkers of America and Nutone, supra.*

> ". . . here there is ample evidence of the respondent's strong anti-union bias and prejudice, and there is also ample evidence to indicate that the drivers involved were selected because of the respondent's belief that as union adherents they would show the union man's well-known respect for and deep seated reluctance to cross picket lines, and refuse to do so, thereby giving an excuse to discharge them . . ."

In its holding, however, the Court, without qualification, indicated that where circumstances similar to those to which the Intervenors were confronted are involved, that a contrary holding would be appropriate. The Court stated thusly:

> ". . . *While we recognize the respondent's right to attempt to run its business in spite of the sympathetic activities of the drivers,* we find no evidence in this case that such was the fact, that is, that the respondent in so doing what it did acted only to preserve the efficient operation of its business." (Emphasis added).

And the court's reasoning in *Cone Brothers* offers further support to the Intervenors' views in stating that:

> "In short, we think that when it appears that a discharge of an employee *for refusing to cross a picket line* is resorted to *out of anti-union animus* to get rid of a union sympathizer *and not to preserve the efficient operation of an employer's business,* an unfair labor practice in violation of 8(a) (1) and (3) occurs." (Emphasis added).

At various points in the record it has been contended by the union that the Intervenors might merely have transferred to other work the drivers who refused their assignments and were discharged.

The administrative difficulties involved in arbitrarily shuffling personnel and the engendering of employee dissatisfaction over loss of one's choice route assignment to

a junior employee would have further complicated the company's attempts to follow sound management practices. But what the Intervenors might have done is not material, for, whatever the Intervenors chose to do, it was undertaken only in the interest of good management and sound economics.

VI. CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

WILSON, BRANCH, BARWICK AND VANDIVER

By: .....
ALEXANDER E. WILSON, JR.

By: .....
JAMES P. SWANN, JR.

CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the foregoing Brief of the Intervenors, Redwing Carriers, Inc., and Rockana Carriers, Inc., upon the following, by depositing same in the United States Mail, properly addressed and with the correct amount of postage affixed thereto:

National Labor Relations Board
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This the ..... day of March, 1964.

.....

ALEXANDER E. WILSON, JR.

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National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

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Labor Management Relations Act, 61 Stat. 136:

Section 502 ..... 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 33a-36a) is reported at 325 F. 2d 1011. The Board's original decision and order (J.A. 6-9)[1] are reported at 130 NLRB 1208. The Board's supplemental decision and order (S.A. 8-13) are reported at 137 NLRB 1545.

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[1] "J.A." references are to the Joint Appendix in the court below. "S.A." references are to the Supplemental Appendix.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1963 (Pet. 2). The petition for a writ of certiorari was filed on February 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer, motivated solely by business considerations, violates Section 8(a)(1) of the National Labor Relations Act by discharging, and subsequently replacing, employees who refuse to perform services inside a picket line at the premises of another employer.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition (Pet. 1b-4b).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Redwing Carriers, Inc. and Rockana Carriers, Inc. ("the Company") are common carriers engaged in hauling various products by truck and constitute a single employer for purposes of the Act (J.A. 15; 39-40, 149).[2] For years, they have carried on regular

[2] Petitioner Union is the representative of the Company's employees and was a charging party before the Board.

hauling operations from and to the premises of Virginia-Carolina Chemical Corporation ("V-C") (J.A. 7, 16; 40, 149). On May 22, 1959, the employees of V-C struck and started picketing (J.A. 7, 16; 40). Between that date and June 2, V-C's operations were restricted by the strike, and the Company's hauling operations were cut back from the normal 60-80 loads a day to 13 for the entire period (J.A. 9, 16; 173, 174).

On June 1, V-C requested the Company to resume normal hauling operations (J.A. 9, 16; 173-174). The next morning, the Company gave V-C assignments to some of its drivers who were regularly assigned to that route (J.A. 9-10, 19; 46, 101-102, 127). After discussing the assignments among themselves and with other drivers, the drivers assigned to V-C informed the Company that they were available for other work, but that they would not cross the V-C picket line because they anticipated personal injury and damage to the Company's equipment (J.A. 10, 19; 127-132).[3] The Company told them that they

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[3] Their apprehensions were based principally on the following incidents: On May 27, Company driver Donald Shirley was stopped at an entrance to V-C's property by pickets shouting "scab" and "picket line breaker" (J.A. 17; 71, 73). Shirley turned back and promptly called the Company for instructions; later he was escorted into V-C by a deputy sheriff (J.A. 10, 17; 71-72). On May 29, Company driver Andre Francoeur approached the picket line at one of V-C's facilities to make a pickup. As he did so, between 25 and 30 pickets "strung themselves across the road" blocking his passage (J.A. 17; 59-60). When Francoeur stopped, the apparent leader of the pickets "jumped on the running board" of the truck

must accept their V-C assignments or be discharged (J.A. 10, 19; 115, 124, 131-132), and in order to alleviate their fears stated that police protection would be provided if necessary (J.A. 10, 19; 127-132). Six drivers refused to accept the assignments; the Company thereupon discharged them[4] and transferred their assignments to its other drivers (J.A. 10, 19; 46, 101-102, 124, 129-132; S.A. 12-13). In addition, starting the same day, the Company hired new drivers to replace those discharged (S.A. 9, 12; J.A. 54).

With the other drivers, Company trucks crossed the V-C picket line on June 2 (J.A. 47, 89), and continued to do so thereafter (J.A. 11, 20; 40-42, 47-48,

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and told Francoeur that "it would be more healthy" if he turned around and did not make the pickup (J.A. 17; 60). Francoeur turned around in order to report the incident to the Company and went to a nearby grocery store, followed by about a dozen pickets (J.A. 10, 17; 60-61, 62). There he telephoned the Company and reported what had happened. He was told to stay where he was and that someone would be sent to help him (J.A. 17; 61). After this call, the pickets milled around Francoeur threatening to assault him and crowding him out of the store (J.A. 17-18; 61-62). Upon returning to the terminal, Francoeur reported to the Company and to the other employees what had happened (J.A. 18; 62-63, 66). Also on May 29, while Company drivers John Sewell and Aubrey Cribbs were eating supper in a diner near V-C's premises, they were approached by 8 or 10 men and told "I hope you boys are not planning on going in [to V-C] because we are on strike and if you do we ain't going to promise you what will happen" (J.A. 10, 18; 106).

[4] Two other employees were later discharged for similar reasons, one that afternoon (J.A. 10-11, 19; 107-108), and the other on July 21, the first time he was given a V-C assignment (J.A. 11, 22; 145-146).

89).[5] The Company hauled over 1800 loads into or out of the V-C plant between June 2 and August 1, when the strike ended (J.A. 11).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board held that, although the employees of the Company engaged in concerted activity within the meaning of Section 7 of the Act in refusing to cross the V-C picket line, the right accorded by Section 7 was not absolute but had to be balanced against the right of the Company to attempt to run its business despite the employees' sympathetic activities (S.A. 10; Pet. 29a-30a). Finding that the Company "terminated the services of the eight drivers not in reprisal for honoring the V-C picket line, but solely to continue [its] business dealings with V-C," and that it had "terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work," the Board concluded that the Company's action was not unlawful (S.A. 12-13; Pet. 31a-32a).[6] The Board accordingly dismissed the complaint in its entirety (S.A. 13; Pet. 32a).

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[5] On June 27, 1959, a Florida state court issued an injunction which, *inter alia*, restrained ten individuals, found to have comitted acts of violence on the picket line, from further participation in the picketing (J.A. 11; 53). There were no further acts of violence on the line after that date, although one acid-throwing incident occurred elsewhere (J.A. 11; 52-53).

[6] The Board rejected the alternative contention that the refusal to cross the V-C picket line was privileged under Section 502 of the Labor Management Relations Act, which pro-

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's findings and conclusions, and affirmed the Board's order dismissing the complaint (Pet. 33a-36a).

ARGUMENT

The decision of the court of appeals is correct. There is no conflict of decisions and no need for further review.

1. Section 7 of the Act gives employees the right "to form, join, or assist labor organizations" and to engage in "concerted activities for the purpose of * * * mutual aid or protection." Employees who refuse to cross a picket line at the premises of another employer with whom the picketing union has a primary dispute clearly render assistance to that labor organization. Moreover, since the employees render such assistance with the expectation that the union and its members will reciprocate should the employees be in a similar situation, the refusal to cross

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vides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act." The Board found (J.A. 10-12) that the picket line misconduct at the V-C premises prior to June 2, 1959, while not to be condoned, constituted "disorder * * * not unusual in any extensive strike," and that "abnormally dangerous conditions" within the meaning of Section 502 did not prevail at V-C when the drivers refused their assignments there (J.A. 11-12; Pet. 6a-7a). The court of appeals found this finding to be supported by substantial evidence (Pet. 36a), and petitioner does not challenge it here.

the picket line is likewise a form of concerted activity for mutual aid or protection. See *Printing Specialties Union* v. *Le Baron*, 171 F. 2d 331, 334 (C.A. 9). Accordingly, an employer who discharges an employee for refusing to cross a primary picket line at the premises of another employer, as a reprisal for having engaged in that activity or to discourage unionization, violates Section 8(a)(1) of the Act. See *National Labor Relations Board* v. *Cone Brothers Contracting Co.*, 317 F. 2d 3 (C.A. 5), certiorari denied, 375 U.S. 945; *L.G. Everist, Inc.*, 142 NLRB No. 20. But action taken by an employer which is an unfair labor practice when motivated by anti-union considerations may be privileged when taken for normal business reasons. See *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405; cf. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221. Thus, the Board has concluded that it is not unlawful for an employer, motivated by a desire to maintain his operations, to replace an employee who refuses to cross a picket line at the premises of another employer with an employee who will. See *Robert H. Snow, d b a Auto Parts Co.*, 107 NLRB 242; S.A. 10-11; Pet. 29a-30a.

That principle was properly applied here. The Board found (S.A. 12-13; Pet. 31a-32a), and the court of appeals accepted its finding (Pet. 36a), that the Company terminated the services of the drivers not in reprisal for honoring the V-C picket line, but solely to continue business relations with V-C; and that, when the drivers refused to make deliveries

to V-C, the Company transferred other men from their normal jobs to make these deliveries and in addition hired new men to replace the discharged drivers.

2. The issue of the extent to which the refusal to cross a "stranger" picket line is protected by Section 7 of the Act was presented in *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, but the Court did not reach it; for the Court found that any right the employee (Waugh) possessed had been waived by his bargaining agent in the no-strike clause of the contract with the employer. However, in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347, the Court held that an employer, in the interest of running his business, may permanently replace employees who are out on an economic strike, although such action tends to limit the right to strike. That principle is equally applicable here. Since employees who go out on an economic strike against their own employer are subject to replacement, the Act should not be construed to accord any greater protection to employees who refuse to perform some of their normal work for their employer because of sympathy for those engaged in a dispute with another employer. This distinction—that an employer may not discharge employees for refusing to cross another employer's picket line as an act of reprisal or to discourage union activity, but may do so where his motive is to run his business and where he promptly transfers the duties of the discharged employee to other employees and hires replacements—places employees who desire

to respect such a picket line in a position essentally similar to that of the economic strikers.[*] Indeed, *Rockaway* recognizes the propriety of this equation, for the Court emphasized that there was "no finding, evidence or even charge that the dismissal of Waugh resulted from antiunion bias, or was intended to or did discriminate against him to discourage membership in a labor organization"; and there was "no finding that he was not replaced either by a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation" (345 U.S. at 75).

National Labor Relations Board v. *Washington Aluminum Co.*, 370 U.S. 9, upon which petitioner relies (Pet. 11-13), is inapposite. That case did not involve the extent to which employees are protected in refusing to cross a picket line at the premises of another employer, but simply the issue whether a spontaneous walkout by an unorganized group of employees in protest over abnormally cold working conditions was unprotected because the employees first had not given

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[*] The exact equivalent would be to require the employer, before discharging an employee who has refused to cross a picket line, to put him in the status of a striker and find a replacement. The Board originally required this added step (see *Cyril de Cordova*, 91 NLRB 1121, 1137-1138; *Rockaway News Supply Co.*, 95 NLRB, 336, 337), but the court in *Rockaway* stated that it was "unrealistic" in this context (345 U.S. at 75). Accordingly the Board has since held that it is sufficient if the duties of the discharged employee are transferred to other employees or replacements are hired contemporaneously with or shortly after the discharge (see S.A. 11-12; Pet. 30a-31a).

the employer an opportunity to correct the grievance. There was no question of hiring replacements for men unwilling to do their normal work.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 1964.

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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 871

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION No. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.,

Intervenors.

PETITIONER'S REPLY TO RESPONDENT'S AND INTERVENORS' BRIEFS IN OPPOSITION

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Petitioner presents the following reply to the Briefs in Opposition, as authorized by Rule 24(4).

1.

THE NLRB OPPOSITION

A.

The Board errs when it asserts (Brief, p. 6) that "there is no conflict of decision: . . ."

The Board's uniform decisions until *Auto Parts*, 107 NLRB 242 (1952) were that discharge for refusal to cross a picket line was unlawful as a deprivation of the "protected" right to engage in "concerted activity" for "mutual aid and protection." See for example, *Re Columbia Pictures Corp.*, 82 NLRB 568 (1949); *Re New York Tel. Co.*, 89 NLRB 383 (1950); *Re Cinch Mfg. Co.*, 91 NLRB 371 (1950); *Re de Cordova*, 91 NLRB 1121 (1950); *Re West Coast Casket Co.*, 97 NLRB 820, (1951); cf. *NLRB v. Montag Bros.*, 140 F. 2d 730 (CA 5, 1944).

The Board's consistent holding in those cases was summarized by the Board itself in its *West Coast Casket* decision, 97 NLRB 820 at 823:

> "this Board has consistently accorded the protection of Section 7 of the Act to employees who, by refusing to cross picket lines or by other lawful means have lent sympathy or support to striking employees. For us to hold otherwise would be to hold that although Congress protected the fundamental right of labor organizations to engage in primary picketing, it withheld this protection from the normal employee response which makes that right effective."[2]

For no apparent reason, other than change in composition of the Board, there followed *Auto Parts*, 107 NLRB 242; and the instant case on initial hearing, 130 NLRB 1208, holding the refusal to cross a picket line "not protected."

---

[1] *Contra NLRB v. Illinois Bell Tel. Co.*, 189 F. 2d 124 (CA 7, 1951).

[2] Compare the Annotation at 51 ALR 2d 519ff. (1953): *"Discharge of employee who refused to cross picket line as unfair labor practice."*

On second hearing the Board issued the decision here under review, 137 NLRB 1545, wherein it departed from both lines of cases and embarked on a third, wherein the employer's motivation is held determinative.

B.

The Board, by this new departure applies to this §§7 and 8(a)(1) case the §8(a)(3) test of "discrimination" wherein "the employer's motive is decisive. . ."[3]

But employer's motive is not relevant in a §§7 and 8(a)(1) case. This was the square holding in *Garment Workers v. NLRB*, 366 U.S. 731 at 739 (1961), citing *"NLRB v. Perfect Circle Co.* (CA 7), 162 F. 2d 566; *NLRB v. Illinois Tool Works* (CA 7), 153 F. 2d 811;[4] *McQuay Norris Mfg. Co. v. NLRB* (CA 7), 116 F. 2d 748; and cf. *NLRB v. Industrial Cotton Mills* (CA 4), 208 F. 2d 87, 45 ALR 2d 880."

The vice of the Board's determination solely on

[3] See Solicitor General Cox's "Some Aspects of the Labor Management Relations Act, 1947," 61 Harv. L. R. 48 at 67ff. (1947):

"The reason the employer's motive is decisive is plain. Imposed legal duties are usually a compromise between conflicting interests, the aggressor being privileged to invade the victim's interest to protect his own, so far as the law recognizes it. Hence, when the aggressor is not actuated by a desire to protect a recognized interest, the basis for his excuse disappears. This philosophy is embedded in Section 8(3). If an employer discharges an employee to protect his interst in building up an efficient working force, he does not commit an unfair labor practice, even though the discharged employee is a union leader and organization is thereby set back. On the other hand, if the employer's action springs from a desire to discourage organization, the privilege is lost and the discharge is unlawful."

[4] In *Illinois Tool* the Court held, 153 F. 2d 811 at 814:

". . . the test of interference, restraint and coercion under §8(1) of the Act does not turn on the employer's motive. . . The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. . . (citing cases)."

the basis of "employer's motive" (Board's brief in opposition, pp. 6-9) was noted in another context by the Third Circuit in *Cusano v. NLRB*, 190 F. 2d 898 at 902:

> "To adopt petitioner's [employer's] view would materially weaken the guarantees of the Act, for the extent of employee's protected rights would be made to vary with the state of the employer's mind."

As the Board's brief admits (p.7) under the test which the Board applies ". . . an unfair labor practice when motivated by anti-union considerations may be privileged when taken for normal business reasons". (Opposition, p. 7).

The trouble is that such a view when applied to §§7 and 8(a)(1) "materially weaken[s] the guarantees of the Act, for the extent of employees' protected rights [is] made to vary with the state of the employer's mind."

The anomalous result is that truckdriver "A" who is employed by a viciously anti-union employer may enjoy and be protected in his "protected" right to refuse to cross a picket line. But driver "B" who works for a pro-union employer finds that his "protected" right to honor the picket line will not be protected. Query how "A" or "B" is to fathom his employer's mind when he approaches the picket line?

C.

The instant decision holds, according to the Board's later *Everist* decision "that a discharge

for refusal to cross a picket line is an exception to the general rule that employees may not be discharged for engaging in protected concerted activity." Such discharge is "not a discharge for cause, but merely a permissible act in furtherance of the employer's overriding right to keep his business going *by replacing such employees.*" *In re Everist*, 142 NLRB No. 20, Slip Opinion p. 4. (Emphasis added)

Had the Board actually followed, in this *Red Wing* case, the rationale which *Everist* says was here followed it could not have reached this result. For Redwing's supervisor in charge of the drivers,[6] Pierola, Joint App. p. 88ff., did *not* discharge and replace them. He admitted: "I had to *transfer* men from the other run to this one," Joint App. 102. Pierola further testified, Joint App. p. 102-103:

> "Q. Did they ever refuse to do any other work that day?
>
> A. No sir they didn't refuse any other work

[5] *Everist* goes on to equate complainants [illegible] replaced by an employer to permit continued [illegible] not permanently replaced, are entitled to reinstatement upon unconditional application.

[illegible] This is the very rationale which the Board *refused* to follow in *Red Wing*. For in the instant case the Board held, Supp. App. p. 11, Appendix to Petition for Certiorari, pp. 501-512:

"In considering the continued validity of the discharge-replacement distinction in this situation, we are convinced that substance, rather than form, should be controlling. That is, where it is clear from the record that the employer acted only to preserve efficient operation of his business, and terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work, we can see no reason for reaching different results solely on the basis of the precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question."

[6] Mendez, Redwing's president, admitted that Pierola "handled" the "going in and getting the drivers in there." Supp. App. p. 35.

except they wouldn't cross the VC picket line.

TRIAL EXAMINER: Was there any reason why they were not capable of doing the other work?

THE WITNESS: No sir they were capable of doing the other work but as I said sir they were permanently assigned to this.

TRIAL EXAMINER: But was there some reason why these seven men couldn't do the work that these men were doing before you took them off?

THE WITNESS: No sir. Of course I had to pull these other fellows that were in no way connected with pulling these runs to come in and do so.

TRIAL EXAMINER: But these men could have done the work of the men that you pulled off of this other run couldn't they?

* * * *

THE WITNESS: Yes sir they could have done the work."

No thought was given to transferring complainants to the "runs" from which others were transferred.

Contrary to the Board's statement that it is only following *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347, its ruling in fact constitutes an unwarranted ex-

tension of the *Mackay* case. An employer who is doing business with a picketed employer has the option of transferring those employees who are willing to go through the picket line to perform the work necessary for him to continue this business, and of using his objecting employees to perform other work. The employer whose employees have gone out on strike obviously has no such option since his striking employees are refusing to perform any work at all. Hence, only in those situations where the employer has too few non-objecting employees to perform the work necessary for him to continue doing business with the picketed employer does *MacKay* justify the discharge of the objecting employees rather than transferring them to other work. This was *not* the situation in the instant case.

Had the Board not been so centered on the "employer motivation" test, it would doubtless have noted the facts, which it ignored, that employer made no effort to transfer the work to non-objecting drivers. And had it done so, it could have balanced the employees' claim to the "protected right" to honor a picket line against the employer's "right to run his business," not on the irrelevant criteria of employer's motive, but on the basis of the actual business necessity for intrusion upon the employees' rights.

Had it done so it would have noted that of the more than fifty drivers in the fleet only a handful insisted on their Section 7 rights; and that employer could easily have vindicated his "right to run his business" by the use of non-objecting

drivers. The suggestion at Redwing's Opposition, pages 12-13, that this would have resulted in "administrative difficulties" cannot be sustained by evidence in the record. In any event, the Board, enamored of its "motivation" test, did not consider this claim. Finally, even had the point been considered, and had the evidence sustained it, as a matter of law employees' §7 "protected" rights should be preferred as against the "administrative difficulties" which an employer may experience in guaranteeing these "protected" rights.

D.

Finally, the Board's narrow view of the extent to which protection of employees "protected" rights to honor a picket line should be vindicated fails to take account of the whole statute. This court at its last decision day emphasized the protected nature of "traditional primary activity of appealing to neutral employees whose tasks aid the employer's every day operations," *Steelworkers v. NLRB*, __ U.S. __, 55 LRRM 2698 at 2701 (March 23, 1964). And noted that "Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at those approaching the situs whose mission is. . . delivering. . . . Congress intended to preserve the right to picket. . . [aimed at] neutral deliverymen furnishing day-to-day service essential to the employer's regular operation." To say that those who observe the picket may not exercise the "protected right" to be persuaded by his message is to circumscribe the right to picket itself. The

right of communication is no less important to the auditor than to the speaker.

2.

THE REDWING (INTERVENORS') OPPOSITION

A.

What we have said above likewise meets the employer's opposition. We note, in addition, only that employer misrepresents our position in asserting "that Section 7 rights are absolute." We do not so contend. We do say that the Section 7 "protected" right is worthy of protection *vis-a-vis* the "administrative difficulties" in which employer predicts he would be involved (Redwing Opposition, pp. 12-13). And we say that any balancing of conflicting rights should not depend on the vagaries of a particular employer's "motivation", but on an analysis on the one hand of the factual context (here violence) which made it in the essential self-interest of the drivers to avoid the picket line. On the other hand a proper balancing of interest required inquiry and findings, which the Board eschews, with respect to the specific "administrative difficulties" facing the employer, the feasibility of transfer of duty to non-objecting employees; or other means of the employer's accommodating temporarily to permit the exercise of employee rights. We shall develop further in brief on the merits suggestions as to criteria which the Board could properly apply to assure maximum vindication of the rights of employees to engage in "protected" §7 activities; of employers "to run

their business," and of the public in an effective transport industry. Here it is enough to say that the Board may not avoid the analysis and policy judgments required in such accommodation by making the employer's "motivation" determinative of the employees' rights.

B.

Finally, we note that neither the Board nor Intervenor challenge our assertion as to the importance of this question. Both seek denial of certiorari on the sole ground that the important question has been decided correctly below. We believe we have demonstrated that it was decided incorrectly. And certainly almost thirty years after the enactment of §§7 and 8(a)(1) the employer, the truck driver, and the customer are entitled to authoritative determination here by which answer may come to the daily recurring question: "Must I go through that lawful picket line?"

WHEREFORE, petitioner prays that certiorari be granted.

Respectfully,

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and
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